Supreme Court, U.S.
FILED
NOV 24 2009
OFFICE OF THE CLERK

146

(3)

No. 09-244

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MIKOLA BOWDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 2, 9
Ashwander v. *TVA*, 297 U.S. 288 (1936) 8
Bowles v. *Russell*, 551 U.S. 205 (2007) 9, 10
Eberhart v. *United States*, 546 U.S. 12 (2005) 4, 12
Harris v. *United States*, 149 F.3d 1304 (11th Cir. 1998) 1, 7
John R. Sand & Gravel Co. v. *United States*, 128 S. Ct. 750 (2008) 9, 10
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 4
Sapia v. *United States*, 433 F.3d 212 (2d Cir. 2005) 2, 9
Schweiker v. *Hansen*, 450 U.S. 785 (1981) 11
Strickland v. *Washington*, 466 U.S. 668 (1984) 5
United States v. *Anthony*, No. 08-14370, 2009 WL 2883457 (11th Cir. Sept. 10, 2009) 6
United States v. *Brown*, No. 08-15488, 2009 WL 3052212 (11th Cir. Sept. 25, 2009) 6
United States v. *Ceballos*, 302 F.3d 679 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137, 538 U.S. 926, and 538 U.S. 939 (2003) 9
United States v. *Cotton*, 535 U.S. 625 (2002) ... 1, 2, 4, 5, 11
United States v. *Hasting*, 461 U.S. 499 (1983) 4
United States v. *Jackson*, 544 F.3d 1176 (11th Cir. 2008), cert. denied, 129 S. Ct. 1925 (2009) 6
United States v. *King*, 559 F.2d 810 (8th Cir.), cert. denied, 130 S. Ct. 167 (2009) 8
United States v. *Olano*, 507 U.S. 725 (1993) 3, 5
United States v. *Pritchett*, 496 F.3d 537 (6th Cir. 2007) 2

Cases—Continued: Page

United States v. *Resendiz-Ponce*, 549 U.S. 102 (2007) 8
United States v. *Salinas* 480 F.3d 750 (5th Cir.), cert. denied, 128 S. Ct. 487 (2007) 8
United States v. *Villafuerte*, 502 F.3d 204 (2d Cir. 2007) 8
United States v. *Williams*, 584 F.3d 714 (7th Cir. 2009) 3
Zipes v. *TWA*, 455 U.S. 385 (1982) 9

Statutes and rule:

Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*:
21 U.S.C. 851 ..... *passim*
21 U.S.C. 851(a) ..... *passim*
21 U.S.C. 851(a)(1) 5
28 U.S.C. 2107(a) 10
Fed. R. Crim. P. 52(b) 2

In the Supreme Court of the United States

No. 09-244

UNITED STATES OF AMERICA, PETITIONER

v.

MIKOLA BOWDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In this case, the Eleventh Circuit, adhering to its decision in *Harris* v. *United States*, 149 F.3d 1304 (1998), held that the government's failure to file a notice that complies fully with the procedural requirements of 21 U.S.C. 851(a) divested the district court of its "jurisdiction" to impose an enhanced, recidivism-based sentence on a convicted drug offender. The court of appeals therefore invalidated that sentence without applying plain-error review, even though respondent had not asserted the Section 851 error in the district court. As the government explained in its petition for a writ of certiorari, the court of appeals' decision is incorrect: it relies on an expansive and outdated definition of the term "jurisdiction," which has been superseded by, and cannot be squared with, a string of this Court's more recent precedents, including *United States* v. *Cotton*, 535 U.S. 625 (2002). Those decisions establish that the term "jurisdic-

tion" refers to "the courts' statutory or constitutional *power* to adjudicate the case," *id.* at 630 (citation omitted)—a power that is not addressed or limited by Section 851. See *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006) (citing *Cotton* for the proposition that "jurisdiction" "involves a court's power to hear a case").

The decision below also perpetuates a conflict in the circuits on this issue. The eight other courts of appeals that have considered the issue have rejected the Eleventh Circuit's outlier position, holding that "[Section] 851 simply 'has nothing to do with [a court's] subject-matter jurisdiction' over a criminal case or a court's general power to impose a sentence," *Sapia* v. *United States*, 433 F.3d 212, 217 (2d Cir. 2005) (second brackets in original). Those courts therefore hold that the absence of a timely objection to a Section 851 error results in a forfeiture and requires plain-error review under Fed. R. Crim. P. 52(b) on appeal. See *Sapia*, 433 F.3d at 217. The question whether noncompliance with Section 851(a) deprives a district court of its statutory power to impose an enhanced sentence is important, and it is squarely presented in this case. This Court's intervention—whether in the form of summary reversal or plenary review—is warranted.

1. Respondent does not dispute that the Eleventh Circuit stands alone against the eight other courts of appeals that have considered the question presented. See Pet. 16-18; *United States* v. *Pritchett*, 496 F.3d 537, 542, 546 (6th Cir. 2007) (noting that "[a]n almost-unanimous majority of circuits that have addressed the issue have held that the section 851(a) requirements are not jurisdictional"; "The only circuit holding that the section 851(a)(1) requirements are jurisdictional is the Eleventh."). Instead, respondent's lead contention is that this Court's intervention is unneces-

sary because the issue is not important. That contention lacks merit.

a. The question presented is important to the administration of the criminal justice system. Section 851(a), which was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, authorizes enhanced penalties for recidivist drug offenders. As the government explained in the petition, Pet. 19-22, the decision below frustrates the purpose of Section 851 because it permits a defendant to escape the congressionally authorized sentence on the basis of unpreserved errors that caused him no prejudice. Respondent is incorrect that the question presented "almost never arises." Br. in Opp. 7-10. Courts regularly address unpreserved claims of Section 851 error, as illustrated by the cases that respondent himself discusses in his brief and includes in his appendix. See *id.* at 13-17; Br. in Opp. App. 11a, 26a. The Court's resolution of this case will determine whether such errors must be noticed on appeal or collateral review despite the defendant's failure to preserve them in the district court.

Respondent observes (Br. in Opp. 8-9) that unpreserved claims of Section 851 error do not often result in the invalidation of enhanced sentences. That is unsurprising, because the Eleventh Circuit is the only court of appeals to adhere to the "jurisdictional" characterization of Section 851. Other courts deny relief on such claims under the rigorous plain-error standard of review. See, *e.g.*, *United States* v. *Williams*, 584 F.3d 714, 718-719 (7th Cir. 2009); *United States* v. *Olano*, 507 U.S. 725, 732 (1993) (power to correct forfeited errors on plain-error review is "circumscribed"). The decisions below and in *Harris* nevertheless demonstrate that the Eleventh Circuit does invoke its "jurisdictional" characterization to strike down sentences on the basis of errors that the defendant did not preserve and

that did not result in prejudice. In these circumstances, the court of appeals has invalidated congressionally authorized sentences under a manifestly erroneous rule of law that conflicts with the view of eight other courts of appeals and with decisions of this Court. That result warrants this Court's review, particularly because, in invoking this rule, the Eleventh Circuit has relied on an outdated understanding of the term "jurisdiction" that this Court has repeatedly sought to dispel. See *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam); *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004) (instructing that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority"); *Cotton*, 535 U.S. at 630.

b. Respondent asserts that the question presented is unimportant because "[c]ompliance with Section 851 lies completely within the control of the Government." Br. in Opp. 10. That argument is also incorrect. Despite the best efforts of prosecutors and judges, good-faith mistakes inevitably arise in the course of filing Section 851(a) notices. Cf. *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983) (reiterating that "there can be no such thing as an error-free, perfect trial" because of "the reality of the human fallibility of the participants"). The type of error alleged in this case—listing the wrong date of conviction—is attributable in part to the large differences in the form and content of rap sheets generated by state and local jurisdictions across the country. Federal prosecutors can and do strive to minimize the frequency with which such errors occur, but that does not diminish the significance of the Eleventh Circuit's position that, when such errors do arise, they must be no-

ticed regardless whether the defendant raised them in the district court.

c. This case squarely presents the conflict among the courts of appeals on the question presented. As the petition explained, both the analysis of this issue and the outcome of this case would have been different had the case arisen in one of the eight courts of appeals that do not treat the requirements of Section 851(a) as "jurisdictional." Those courts would have applied plain-error review, requiring respondent to show, *inter alia*, that the alleged defects in the information "affec[ted his] substantial rights" by causing him prejudice and also "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (citation omitted). Respondent could not satisfy either of those showings. As a result, in those eight courts, respondent would not have received a sentence far less than that mandated by law because of a non-prejudicial error in the Section 851(a) notice that he never raised in the district court. *Cotton*, 535 U.S. at 634.[1]

---

[1] As further support for his contention that the question presented is not significant, respondent argues (Br. in Opp. 9-10) that the courts of appeals that have rejected the Eleventh Circuit's position may nevertheless grant a defendant relief from an enhanced sentence on the ground that the Section 851 error was plain or that counsel was ineffective in failing to assert it in the district court. This case illustrates why that contention is erroneous. Because respondent could not have established that he was prejudiced by the flaws in the notice of enhancement, he could not satisfy the plain-error standard. See Pet. 23. And because the government would have amended the notice of enhancement in the district court if counsel had raised those flaws before sentencing, see 21 U.S.C. 851(a)(1) ("Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence"), respondent could not show ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984) (requiring a showing of both deficient performance and prejudice).

2. Respondent nonetheless contends that this case is a poor vehicle in which to consider the question presented. That contention is based on his assertions that the law in the Eleventh Circuit is "unsettled," that the court of appeals should be afforded an opportunity to reconsider its position, and that this Court would have no occasion to reach the question presented if it granted review. Br. in Opp. 12-20. Each of those assertions is incorrect.

a. The Eleventh Circuit has never wavered from its position, expressed in *Harris*, that a timely, accurate, and complete Section 851(a) notice is "jurisdictional" in nature. See, *e.g.*, *United States* v. *Jackson*, 544 F.3d 1176, 1184-1185 (2008) ("We recognize that the [Section] 851 'notice requirement is jurisdictional: unless the government strictly complies, the district court lacks jurisdiction to impose the enhanced sentence.' *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007); *see United States v. Thompson*, 473 F.3d 1137, 1144 (11th Cir. 2006) * * *; *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998)."), cert. denied, 129 S. Ct. 1925 (2009). Indeed, the Eleventh Circuit reaffirmed that longstanding position in the two decisions, issued after the decision below, that respondent cites (Br. in Opp. 15-17) and includes in the appendix to his brief. See *United States* v. *Anthony*, No. 08-14370, 2009 WL 2883457, at *5 (Sept. 10, 2009) (unpub.); Br. in Opp. App. 12a (Section 851(a) "notice requirement is jurisdictional: unless the government strictly complies, the district court lacks jurisdiction to impose the enhanced sentence.") (citing cases so holding); *United States* v. *Brown*, No. 08-15488, 2009 WL 3052212, at *5 (11th Cir. Sept. 25, 2009); Br. in Opp. App. 26a ("[A] district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a),"

and "this jurisdictional defect is not waivable") (citing *Harris*, 149 F.3d at 1306, 1309).

To the extent there is any lack of clarity in the Eleventh Circuit's law concerning Section 851(a), it concerns the entirely separate question of what constitutes adequate compliance. See Br. in Opp. 8-10 & n.2. But any inconsistency on that question cannot and does not detract from the clarity of the Eleventh Circuit's position that, when compliance is inadequate, a district court is divested of its jurisdiction to impose an enhanced sentence. That latter conclusion is the focus of this petition, and its correctness is squarely presented by this case.

There is no merit to respondent's related contention (Br. in Opp. 12-14) that the Eleventh Circuit should be afforded an opportunity to reconsider its decision in *Harris*. As respondent observes, the government opposed certiorari in three prior cases presenting this issue precisely to give the Eleventh Circuit this opportunity. See *ibid.* That is why, before seeking this Court's intervention, the government petitioned for en banc review in this case, urging the full court of appeals to overturn *Harris*. That en banc request provided the Eleventh Circuit a clear chance to revisit its position, and by declining the government's request, the Eleventh Circuit indicated that it did not intend to do so. As noted, the Eleventh Circuit has confirmed that intent by reaffirming the *Harris* rule in cases issued after the decision below. The Eleventh Circuit's position is settled and ripe for this Court's review.

b. Respondent asserts (Br. in Opp. 18-19) that this Court might not reach the question presented because it "would appropriately first consider" whether there was any error in the first instance—*i.e.*, whether the notice was in fact compliant with Section 851(a)—and could rest a reversal on that ground. That suggestion, of course, is inconsis-

tent with respondent's claim (*id.* at 27) that sustaining the "ambiguous" notice here would violate congressional intent to entrust the enhancement decision "to the prosecution and not the courts." But in any event, no principle of law or logic requires this Court to decide whether error occurred before resolving whether, if error occurred, it was plain. Indeed, the plain-error ground would be the narrower basis for decision. See, *e.g.*, *United States* v. *Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007) ("[W]e need not decide whether the district court erred here because any possible error is not plain."); *United States* v. *King*, 559 F.3d 810, 814 (8th Cir.) (same), cert. denied, 130 S. Ct. 167 (2009); *United States* v. *Salinas*, 480 F.3d 750, 759 (5th Cir.) (same), cert. denied, 128 S. Ct. 487 (2007).

For that reason, respondent's reliance on *United States* v. *Resendiz-Ponce*, 549 U.S. 102 (2007), is misplaced. The question on which the Court granted certiorari in that case was whether the omission of an element from an indictment can constitute harmless error. The Court declined to reach that constitutional question because there was a narrower basis for its decision, and "'[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Id.* at 104 (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). That avoidance canon is inapplicable in this case because the question presented is not constitutional, and respondent cites no analogous rule of law that would require the Court to decide the statutory compliance issue before addressing the legal consequences of respondent's failure to object.

3. Respondent fails in his attempt (Br. in Opp. 20-28) to defend the decision below on the merits. For the reasons explained in the petition, Section 851 has none of the attributes that this Court has identified as indicative of jurisdic-

tional status. The provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh* v. *Y&H Corp.*, 546 U.S. at 514-515 (2006). *Id.* at 515 (quoting *Zipes* v. *TWA*, 455 U.S. 385, 394 (1982)). As every court of appeals other than the Eleventh Circuit to consider the issue has concluded, "[Section] 851 simply 'has nothing to do with [a court's] subject-matter jurisdiction' over a criminal case or a court's general power to impose a sentence." *Sapia* v. *United States*, 433 F.3d at 217 (quoting *United States* v. *Ceballos*, 302 F.3d 679, 692 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137, 538 U.S. 926, and 538 U.S. 939 (2003)); see Pet. 16-18.

Respondent's challenge to that conclusion relies primarily on two recent decisions of this Court, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750 (2008), and *Bowles* v. *Russell*, 551 U.S. 205 (2007). Respondent contends that those decisions support a categorical distinction between statutory rules, which are jurisdictional, and court-promulgated rules, which are not. He argues that because Section 851 was imposed by Congress, it "necessarily falls on the statutory—and therefore jurisdictional—side of the ledger." Br. in Opp. 21. That contention is incorrect.

The "statutory origin" of Section 851 does not support the Eleventh Circuit's characterization of its requirements as "jurisdictional." Br. in Opp. 22. In *Arbaugh*, this Court announced a general rule of construction that "when Congress does not rank a statutory limitation * * * as jurisdictional, courts should treat the restriction as nonjurisdictional in character." 546 U.S. at 516. For the reasons the government has identified, there is no indication that Congress ranked the notice provisions and procedurals rights in Section 851 as jurisdictional in nature, and courts therefore must treat them as nonjurisdictional. Neither *John R. Sand* nor *Bowles* required that all statutory rules be treat-

ed as "jurisdictional" or retreated from this Court's careful definition of that term in *Cotton*, *Kontrick*, and *Eberhardt*. Instead, both *John R. Sand* and *Bowles* relied on this Court's settled construction of a particular statute and applied *stare decisis* to hold that certain time limits are jurisdictional even though not denominated as such. See *John R. Sand*, 128 S. Ct. at 753-754, 756-757 (relying on *stare decisis* to hold that the statute of limitations governing the Court of Federal Claims is jurisdictional); *Bowles*, 551 U.S. at 209-210 & n.2 (citing "a century's worth of precedent" supporting the conclusion that 28 U.S.C. 2107(a)'s time limit for filing a notice of appeal is jurisdictional). In addition, the statutory provision at issue in *Bowles* provides that, unless the notice of appeal in a federal civil case is filed in a timely fashion, "no appeal shall bring any judgment, order or decree * * * before a court of appeals for review." 28 U.S.C. 2107(a). In contrast to Section 851, that provision speaks to adjudicatory power by stating that an untimely notice of appeal will not bring the case to the court. *John R. Sand* and *Bowles* therefore provide no support to the decision below.

Respondent argues (Br. in Opp. 25-27) that the Eleventh Circuit's position comports with Congress's intent because the purpose of Section 851 is to afford defendants notice about the possibility of an enhanced sentence. In respondent's view, that purpose is frustrated when the government does not comply with the specific procedures Congress provided. But that argument does not explain why Section 851, unlike other provisions that govern the conduct of litigation, should be exempted from the general rule that they may be forfeited or waived if not timely asserted in the district court. For the reasons the government explained in the petition, there is no basis for such an exemption. Although Congress prescribed procedures in Section 851

for the imposition of an enhanced sentence, it did not intend to permit recidivist drug offenders to escape such sentences when, because of prosecutorial oversight, an information filed under Section 851 contains easily corrected errors that cause the defendant no prejudice and to which he did not object. See Pet. 22.

Finally, respondent asserts that Section 851 is analogous to a charging decision and contends that "[a] court has no greater jurisdiction to enter an enhanced statutory sentence based on a defective information from the prosecution than it would have to enter a judgment of conviction in the absence of a criminal charge." Br. in Opp. 28. That argument, however, is foreclosed by *Cotton*, which held that defects in the charging instrument do not deprive the district court of jurisdiction to enter a conviction. See *Cotton*, 535 U.S. at 631. *Cotton* compels the conclusion that, contrary to respondent's assertion, a court also does not lose "jurisdiction" to impose an enhanced sentence as a result of defects in the notice of enhancement filed under Section 851.

4. The petition suggested that, because the Eleventh Circuit's position is not only wrong but also at odds with this Court's precedents and all other decisions of the courts of appeals, the Court may wish to consider summary reversal. Respondent disagrees, contending that summary reversal should be reserved for situations in which "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Br. in Opp. 20 (quoting *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). Assuming that respondent's standard accurately encapsulates the circumstances when summary reversal is warranted, those circumstances are present here. The law regarding the types of errors that are properly classified as "jurisdictional"—*i.e.*, those that Congress has

specifically denominated as limiting the court's adjudicatory power—is settled by this Court's recent decisions. The relevant facts of this case are not in dispute, and the decision below is incorrect because it rests on an outmoded and overly expansive definition of the term "jurisdiction." Summary reversal therefore is no less appropriate here than it was in *Eberhart*. See 546 U.S. at 13.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted.

ELENA KAGAN
Solicitor General

NOVEMBER 2009